1965

Frank Fuoco and Anna Fuoco v. Benjamin H. Williams and Verna v. Williams : Appellant's Reply Brief

TABLE OF CONTENTS

AUTHORITY CITED

CASES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

FRANK FUOCO and ANNA FUOCO,
Plaintiffs-Appellants.

vs.

BENJAMIN H. WILLIAMS and VERNA V. WILLIAMS,
Defendants-Respondents.

No. 10362

APPELLANTS' REPLY BRIEF

STATEMENT OF POINTS

1. The trial court erred in holding that it was bound by the verdict of the jury in the first trial with respect to the location of the ditch.

2. The respondents have failed to call attention in their brief to any evidence of *mutual* recognition of the ditch as a boundary line over a long period of time.

ARGUMENT

1. THE TRIAL COURT ERRED IN HOLDING THAT IT WAS BOUND BY THE VERDICT OF THE JURY IN THE FIRST TRIAL WITH RESPECT TO THE LOCATION OF THE DITCH.

The respondents argue, point A, that the trial court correctly relied upon the finding made by the jury in the first trial with respect to the location of the ditch which is claimed to be the boundary line. They then argue that the testimony of witnesses as to use of the land on each side of the disputed boundary line ditch relates to the ditch in the location found by the jury and not to a ditch in the location recalled by the witnesses. For example, on pages 8, 9 and 10 of the Respondents' Brief reference is made to the testimony of witnesses Owen Sanders, Frank Young and others relating to use of the property east of the ditch as it existed 20 feet east of the present ditch, and the impression is given that such testimony refers to the use of land east of the present ditch.

The fact is that the second trial was a trial de novo. The findings of the jury in the first trial was not binding upon the litigants and the court in the second trial.

In its memorandum decision dated February 19, 1965, (R. 26, 27), the trial court said:

> "Much testimony was offered at the time of the trial of this matter by the respective parties concerning the location of the irrigation ditch

in question. However, it would appear from the Supreme Court's decision that the matter of the location of the irrigation ditch had already been determined by the jury on the previous trial and that that question was not properly before the Trial Court in this matter. . . ."

This was clearly error.

The previous judgment of the district court was reversed and the case was remanded for a new trial. The pertinent language is as follows:

> "Therefore, the judgment of the trial court is reversed and remanded for a new trial, with instructions to the effect that the judge or jury should determine the matters of whether the ditch was *acquiesced* in over a long period of time, as a *boundary* and not simply as an irrigation memium. Costs to appellants."

The law is well settled in Utah as in other jurisdictions that when a judgment is reversed it no longer has any force or effect for any purpose.

I quote from Bouvier's Law dictionary:

> "Reverse, Reversed. A term frequently used in the judgments of an appellate court, in disposing of the case before it. It then means 'to set aside, to annul, to vacate.' Laithe vs. McDonald ,7 Kans. 254."

In the case of Larsen vs. Gasberg, 30 Utah 470, 86 P. 1906, the judgment of the district court was reversed. The precise language was:

> "The judgment is reversed, with directions to the lower court to grant a new trial."

At the subsequent trial the question was raised as to the effect of the reversal of the judgment. I quote:

> " . . . What we do say is that we think it clearly appears from the opinion that the cause was remanded for a new trial to give the parties an opportunity to try the question of fraud, a matter concerning which appellant had not had his day in court. Let that be as it may, the judgment of the lower court was reversed and the cause remanded without any specific directions except that a new trial should be granted. The rule is well settled that, where a judgment is reversed and a new trial granted without any specific instructions or directions, the case stands in the lower court precisely as it did before a trial was had in the first instance. The general rule in this regard is well stated in 3 Ency. L. & P. 579, in the following language:
>
> 'When a decree is reversed and the cause remanded without specific directions, the decision of the court below is entirely abrogated, and the cause then stands in the court below precisely as if no trial had occurred, and that court has the same power over the record as it had before its decree was rendered, and it may permit amendments to the pleadings to the same extent that it might have done before the trial, and in the exercise of the same discretion, except that it is concluded by the legal principles announced by the appellate court. And where a cause is reversed and remanded with directions to proceed in conformity with the views expressed in the opinoin filed, and it appears from such opinion that the grounds of reversal are of a character which may be obviated by subsequent amendments of the

pleadings or the introduction of additional evidence ,it is the duty of the trial court to permit the cause to be redocketed and to permit amendments to be made and evidence introduced on the hearing just as though it was being heard for the first time'. . . "

In the case of Madsen vs. Madsen, 78 Utah 84, 1 P.2d 946, the Supreme Court of Utah again had before it the question as to the intent of the appellate court in remanding a case. The court said:

" . . . The language used in the former decision seems to be clear and unequivocal. We can not see how it can be construed in any way other than as vacating the judgment of the trial court. When the court says 'The judgment will have to be set aside,' and follows those words with, 'Such is the order,' it can only mean that the judgment is set aside, vacated and annulled, and, having been thus swept from existence, the lower court has no power to breathe into any part of it the breath of life.

The intention to vacate the entire judgment is further evidenced by the following language of the remittitur: 'It is ordered, adjudged and decreed, that the judgment of the District Court be and the same is set aside.' The order having vacated an entire judgment, it cannot be construed as affirming any part of it.

As to whether the decision of the appellate court necessitates a new trial after remand, depends on the intention of the appellate court, and where there is doubt as to this, it is generally resolved in favor of a new trial. There is, of course, no doubt of the intention of the appellate

court where it has specifically ordered a new trial. and even where the appellate court has not specifically ordered a new trial, it is generally held that a new trial is intended and necessary where the case has been reversed and remanded generally, and especially where the reversal was for error anterior to the verdict.

Generally a judgment of reversal embracing no special directions, simply vacates the judgment excepted to, and it is to be followed by a new trial in the court below. Woods vs. Jones, 56 Ga. 520 . . . "

See also Gray vs. Defa, 153 P.2d 544, 107 Utah 272.

The case of McIsaac vs. Hale, 135 A. 37, 105 Conn. 249, involved a factual situation similar to the one in the present case. It was contended in the second trial that the finding on certain issues in the first trial which were recited in the opinion of the appellate court was binding on the trial court in the second trial. The Supreme Court held:

" . . . The sole ground of the present appeal is that the trial court had no right on the second trial to reopen the issue as to the improvements which were intended to be included in estimating the increased rental provided in the lease, but that the finding on the first trial and the decision by this court concluded the parties upon that issue. The effect of the finding of error on the first appeal and the remanding of the case to be proceeded with according to law was to destroy entirely the efficacy of the judgment appealed from and to require a new trial of all the issues

> in the case. Lewis vs. Yale, 78 Conn. 202, 207, 61 A. 634. The statements of fact in the opinion of this court were merely the adoption of the findings of the trial court for the purpose of the determination of the appeal, and gave to those findings no additional force . . . "

It should be noted that the error for which the Fuoco case was reversed was anterior to the verdict. Under the Madsen case it is clear that we were entitled to a trial de novo of all issues.

The language of the Supreme Court decision following the unqualified statement that the "judgment of the trial court is reversed and remanded for a new trial" namely "with instructions to the effect that the judge or jury should determine the matters of whether the ditch was *acquiesced* in over a long period of time *as a boundary* and not simply as an irrigation medium" was obviously intended to emphasize the point on which the court erred in the former trial. If we should construe it as a direction to determine only the one issue the Supreme Court would not have stated unequivocably that "the judgment . . . is reversed and remanded for a new trial," but would have simply stated that "the case is remanded to the trial court for the trial of the question as to whether the ditch was acquiesced in as a *boundary.*" An order of reversal and new trial is entirely inconsistent with a remand for the determination of one issue.

The second trial of this case proceeded as a trial de novo. No objection was made to the introduction of

evidence on the location of the ditch and no indication was given at the pre-trial that we were not to have a new trial on all issues.

It is significant that in its memorandum decision the trial court said:

> "In passing, had the entire matter been before this court a different conclusion might have been reached."

We submit that it was the obligation of the respondents to prove in the second trial of this case the four elements stated in the decision of the Supreme Court on the first appeal, Fuoco vs. Williams, 15 Utah 2d 156, 389 P.2d 143, as follows:

> " . . . This court over a period of years has formulated four elements which must be shown by the person claiming title by acquiescence in order to raise the presumption that a binding agreement exists settling a dispute or uncertain boundary. These elements are: (1) occupation up to a visible line marked definitely by monuments, fences or buildings and (2) acquiescence in the line as the boundary (3) for a long period of years (4) by adjoining land owners."

The evidence referred to on pages 12-14 of the Appellants' Brief should not have been ignored by the trial court. This shows by reference to existing physical features where the old ditch described by the witnesses was located. *It was on the record boundary line designoted "CD" on the map Exhibit P-1.* This fact should have been determinative of the case.

2. THE RESPONDENTS HAVE FAILED TO CALL ATTENTION IN THEIR BRIEF TO ANY EVIDENCE OF *MUTUAL* RECOGNITION OF THE DITCH AS A BOUNDARY LINE OVER A LONG PERIOD OF TIME.

The respondents' argument relating to proof of *mutual acquiescence* consists only of general references to testimony as to occupancy of the respondents' land up to the ditch. This court held on the first appeal that such evidence is not enough to show that the ditch was considered a boundary line or that the plaintiffs' predecessors ever acquiesced in it as a boundary line. Fuoco vs. Williams, supra.

The evidence discussed on pages 15-18 of Appellants' Brief relating to (1) the record ownership of the two parcels of land, (2) the admitted fact that during the period 1939 to 1959 the Fuoco property was cultivated only one year, (3) the admitted fact that for 19 years the Fuoco parcel was in weeds, and (4) the further admitted fact that for 10 years prior thereto both parcels were cultivated by the respondent Benjamin H. Williams' father, clearly negatives any proof or presumption of acquiescence in the ditch as a boundary line by the appellants' predecessors. There is no evidence that between 1896 and 1936 Melinda H. Butterworth ever acquiesced in the ditch as a boundary line; nor is there evidence that Annie N. M. Christensen and Effie G. Butterworth acquiesced between 1936 and 1951; nor is there evidence that between

1951 and 1959 H. Leland Christensen so acquiesced. This case was reversed on the first appeal for failure of proof on this point. The respondents have again failed to produce any evidence.

It is respectfully submitted that the judgment of the district court should again be reversed and remanded and the district court should be directed to dismiss the respondents' counterclaim.

E. J. SKEEN
Attorney for Appellants